We therefore conclude that regulation 2(2) attracts the pure judgment of the Attorney General cannot be subjected to an objective test and is not accordingly amenable to judicial review. We accordingly dismissed the motion for an order of certiorari.

That is not the end of the matter before us. There was another appeal (Federal Court Civil Appeal No.218/82) by the appellant regarding an originating summons for declaratory relief which he had earlier brought and which was struck out by the learned judge under Order 18, rule 19 of the Rules of the High Court, 1980. The appellant had also in that case sought to similarly impugn the certificates issued by the Attorney General under regulations 2(2) and 6(1) of the Essential (Security Cases) Regulations, 1975 and the order of the learned magistrate transferring the case to the High Court, Kuala Lumpur. We think that in the circumstances of this case certiorari is the appropriate remedy to be sought and not a declaration, and we need only refer to the judgment of Abdoolcader, J. in *Sungai Wangi Estate* v. *Uni*[13]; *Anisminic Ltd* v. *Foreign Compensation Commission*[14] (per Lord Reid at page 213 and per Lord Pearce at page 233) and *Re Tillmire Common, Heslington*[15] in support. To dispose of this matter we allowed this other appeal and set aside the judgment of the learned judge in that case, and counsel on behalf of the appellant then very properly at our suggestion withdrew the originating summons which we accordingly struck out.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar.*

JAGINDER SINGH & ORS. v. ATTORNEY-GENERAL

[F.C. (Raja Azlan Shah Ag. L.P., Abdul Hamid F.J. & Abdoolcader J.) September 24, 1982]

[Kuala Lumpur – Federal Court Criminal Appeal Nos. 28, 29 & 30 of 1982]

Criminal Law & Procedure – Contempt of Court – Whether advocates and solicitors guilty of contempt – Persons defendants in civil action and sued in their personal capacity – Borderline between perjury and contempt – Persons committed not informed of the specific offence or offences with which they were charged and not given an opportunity of defending themselves – Order of contempt set aside.

In this case the appellants, who were advocates and solicitors, were defendants in a civil case involving a land matter. After a trial which lasted 28 days spread over a period of three months, the learned Judge gave judgment in favour of the plaintiff and against the defendants. He went further and without specifying any charge or charges and without giving them an opportunity to defend themselves, committed each of the appellants to imprisonment for a term of two years for contempt of court on the ground that they had conspired to deceive the court by representing appellant No. 3 as the owner of the land, the subject matter of the case, when in reality he was not. The appellants appealed. It was argued (a) that the learned judge was not justified in concluding on the facts that the appellants were guilty of contempt and (b) the learned judge erred in law in committing the appellants for contempt of court without first informing them of the specific offence or offences with which they were being charged and without giving them an opportunity of defending themselves.

Held: (1) as a finding of contempt of court is a conviction of an offence, the jurisdiction must be exercised sparingly and where it is absolutely necessary;

(2) To take a case across the borderline that separates perjury from contempt, there must be a manifestation in some form of an intention on the part of the witness not to give a real answer. False testimony together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony without more does not;

(3) in the present case the appellants were defendants in a civil action and sued in their personal capacity but the learned judge found them in contempt of court as advocates and solicitors and in their professional capacity. Mere false testimony does not constitute contempt but contempt of court will lie not only in the false testimony but in the obstruction or frustration of the administration of justice. In this case the conclusion of the learned judge that the appellants were guilty of contempt was not justified;

(4) the summary contempt procedure should be employed most sparingly and should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress or about to commence;

(5) in this case where the case has ended there was no imperative need for instant punishment as is shown by the period that has elapsed between the conclusion of the trial and the delivering of judgment, a period of some eight months;

(6) the disturbing aspect in this case was that no specific charges against the appellants were distinctly stated and what was worse they were not given an opportunity to answer and defend themselves. It was unthinkable that they should be sent to prison unless specific charges were framed and they have had an opportunity to answer them. What vitiated the committal for contempt of court in this case was the learned Judge's failure to make plain to the appellants the specific nature of the charges and to give them the opportunity of a fair hearing.

Cases referred to:

1. *Izuora* v. *R.* [1953] A.C. 327, 334-5.

2. *Shamdasani* v. *King Emperor* [1945] A.C. 264, 270.
3. *R.* v. *Weisz and Another* [1951] 2 K.B. 611.
4. *Linwood* v. *Andrews and Moore* (1888) 58 L.T. 612.
5. *Geoffrey Silver & Drake* v. *Thomas Anthony Baines* [1971] 1 All E.R. 473.
6. *Coward* v. *Stapleton* (1953) 90 C.L.R. 573.
7. *Karam Singh* v. *P.P.* [1975] 1 M.L.J. 229.
8. *Re Kumaraendran* [1975] 2 M.L.J. 45.
9. *In re Pollard* (1868) L.R. 2 P.C. 106.
10. *Maharaj* v. *Attorney-General for Trinidad and Tobago* [1977] 1 All E.R. 411, 416.

FEDERAL COURT.

Lim Kean Chye for the 1st appellant.

R.R. Chelliah for the 2nd appellant.

R.T.S. Khoo (*Lim Kean Chye* with him) for the 3rd appellant.

Cur. Adv. Vult.

Raja Azlan Shah Ag. L.P. (delivering the Judgment of the Court): This is an appeal by three advocates and solicitors against summary conviction and sentence for contempt of court.

The circumstances resulting in the appellants' conviction for contempt may be briefly stated. The appellants were defendants in a civil case involving a land matter and in a reserved judgment delivered some eight months after the conclusion of the trial which lasted 28 days spread over a period of some 3 months, the learned judge gave judgment in favour of the plaintiff but at the end of it he went further, and without specifying any charge or charges and without giving them any opportunity to defend themselves, committed each of them to imprisonment for a term of 2 years for contempt of court on the ground that they had conspired to deceive the court by representing appellant No. 3 as the owner of the land, the subject matter of the case when in reality he was not. Appellant No. 2 was not present in court when the order was made against him.

In substance there are only two grounds of appeal. We will now deal with the first ground. It is said that the learned judge was not justified in concluding that on the facts the appellants were guilty of contempt.

The learned judge reminded himself that the summary jurisdiction of the High Court of its own motion to punish for contempt was to be exercised with caution, and only when it was urgent and imperative to act immediately, but that it should not shrink from exercising that jurisdiction where, being satisfied beyond reasonable doubt of the contempt, it became in the particular circumstances his duty to do so. We fully agree with his observations and expressions of caution and self-direction. In our opinion, it correctly expresses the relevant law. As a finding of contempt of court is a conviction of an offence (see *Izuora* v. *R*[1]; *Shamdasani* v. *King Emperor*[2]), the jurisdiction must be exercised sparingly, and where it is absolutely necessary.

The learned judge exercised his summary jurisdiction to punish for contempt on the ground that the appellants had deceived the court and in so doing had broken the trust and confidence which the court had placed on them as lawyers. That is evidently his view as can be gathered from the reasons appearing in the judgment. It will be convenient to set out the relevant passage:

> "The defendants' misdeeds are acts of contempt of the worst kind that the court can possibly think of, because in seeking to achieve their evil end and insatiable greed they made the court the subject of their deception and mischief. The extreme culpability of their ill-doing lay in the fact that the trust and confidence which the court places on them as lawyers had been used only to defile that trust by acting to deceive the court thereby becoming the subject of their mockery ridicule and contempt. The court can dispense with justice only if counsel will not mislead, otherwise justice will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of lawyers if the court itself, in which he seeks redress is no longer safe to be in the same hands. To me the defendants' act is even more despicable because it is an expressed advocates & solicitors rule that counsel shall not practise deception on the court (Rule 17). They have by falsely representing that the 3rd. defendant was the owner of the land acted in utter defiance and disregard of the court and the rules of their own profession."

The learned judge relied heavily on two English cases: *Rex* v. *Weisz & Anor.*[3] and *Linwood* v. *Andrews and Moore*[4]. In the former case, a solicitor was held guilty of contempt of court when he instituted proceedings by writ containing a fictitious endorsement for the purpose of concealing from the court that the action was not maintainable in law. In the latter case, a barrister was found guilty of contempt of court for being a party to a fraud and conducting his case so as intentionally to deceive the court. He had conspired with others to induce his clients to make affidavits which he knew to be false and were used to delude the courts. Those cases, in our opinion, bring into focus the well-established rule that advocates and solicitors in their professional capacity may, by the manner in which they conduct their cases, find themselves in con-

tempt of court. They are officers of the court and are answerable to the court for contumelious conduct in the discharge of their duties as such. The court has summary jurisdiction over them when acting in their professional capacity: see *Geoffrey Silver & Drake* v. *Thomas Anthony Baines*[5].

In the present case, the appellants were defendants in a civil action and sued in their personal capacity but the learned judge found them in contempt of court as advocates and solicitors and in their professional capacity. The scathing reference by the learned judge was directed to the evidence they gave as parties and witnesses in the action and accordingly the two cases he purported to apply had no relevance in the circumstances.

The facts of the present case themselves demonstrate the special danger in blurring the distinction between perjury and contempt. A case of contempt by false testimony is relatively rare. In general, such false testimony will result in the party or witness being liable to prosecution for perjury. Contempt of court would lie not only in the false testimony but in the obstruction or frustration of the administration of justice. What is required is "an evinced intention" to interfere with the course of justice. That, in our opinion, is what contempt of court is all about. The approach to be taken in such a case as the present was considered by the High Court of Australia in *Coward* v. *Stapleton*[6]. In that case the court was concerned, not with the standard of proof required in such a case, but with the question whether contempt by prevarication could be established, that is, the conduct of a witness who deliberately evades questions by falsely swearing that he has no recollection. The appellant in that case was a bankrupt who in his public examination gave answers of which a substantial number represented, in the opinion of the Federal Court of Bankruptcy, "a shuffling and a fantastic attempt to conceal the truth" about his financial dealings. The court thereupon ordered that the bankrupt be committed for contempt of court upon the basis that he had refused to answer questions. On appeal the High Court held that "the order must mean that the learned judge considered that some of the purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they related". It was in that context that the court went to make the following observations (pages 578-9):

> "It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. A disbelief on the part of the court in the truth of the purported answer is not, without more, a sufficient foundation for such a conviction. The words used, considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can be properly called an answer to the question. There must be a manifestation in some form of an intention on the part of the witness not to give a real answer. It is essential not to lose sight of the sharp distinction that exists between a false answer and no answer at all. Of course a purported answer may be so palpably false as to indicate that the witness is merely fobbing off the question. His attitude in the box may show that he is simply trifling with the court and is making no serious attempt to give an answer that it is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, *but it cannot be too clearly recognized that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt.* Such a committal can be justified only by a specific finding of an evinced intention to leave a question or questions unanswered, or by a finding of contempt in some other defined respect." (emphasis added).

In the event, the appeal was upheld on the ground that the bankrupt had not been given a reasonable opportunity of being heard in his own defence.

What does emerge as a general proposition from *Coward* v. *Stapleton* (*supra*) is that "there must be a manifestation in some form of an intention on the part of the witness not to give a real answer", a finding that takes the case across the borderline that separates perjury from contempt. False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; false testimony, without more, does not.

It follows that the learned judge had wrongly applied the principle enunciated in *Coward* v. *Stapleton* (*supra*) when he held that the appellants were guilty of contempt. His conclusion, in our opinion, is not therefore justified.

That brings us to the second ground of appeal, that is, the learned judge erred in law in committing the appellants for contempt of court without first informing them of the specific offence or offences with which they were being charged and without giving them an opportunity of defending themselves.

We have said many a time that the summary contempt procedure not only should be employed

most sparingly but should rarely be resorted to except in those exceptional cases where it is urgent and imperative to act immediately to preserve the integrity of the trial in progress or about to commence. (See *Karam Singh* v. *P.P.*[7], *Re Kumaraendran*[8]). Although in the former case the counsel who was appearing on behalf of a defendant in a criminal case under section 170 of the Penal Code was involved in a heated argument with the magistrate and in the latter case the counsel who was defending a client charged with an offence under the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958 had conducted himself in an insolent and contemptous manner, it was held that the summary contempt procedure should not have been invoked for it was not urgent or imperative. Counsel must of course not shrink from representing his client's interests fearlessly and with determination. That does not however mean that he is permitted to be offensive to the Bench or to cast aside the common standards of politeness which have always been the aim and pride of the Bar in this country. It is to be hoped that incidents like the ones appearing in those two cases will never recur.

In our opinion, where the case has ended there is no imperative need for instant punishment as is shown in this case by the period which had elapsed between the conclusion of the trial and the delivery of judgment, a period of some 18 months. The disturbing aspect, amongst others, in this case is that no specific charges against the appellants were distinctly stated and what is worse they were not given an opportunity to answer and defend themselves. It is unthinkable that they should be sent to prison unless specific charges were framed and they have had an opportunity to answer them. This is because the summary contempt procedure more often involves a denial of many of the principles of natural justice, requiring, as it did in this case, that the judge should not only be both prosecutor and adjudicator, but should also have been witness to the matters to be adjudicated upon.

This salutary rule has been clearly stated as long ago as 1868 in *In re Pollard*[9], where the Judicial Committee of the Privy Council was at pains to point out that in its judgment "no person should be punished for contempt of court, which is a criminal offence, unless the specific charge against him be distinctly stated, and an opportunity of answering it given to him". The care with which the power to punish summarily for contempt of court is to be exercised has been repeatedly stressed by the courts and this principle was reiterated in *Maharaj* v. *Attorney-General for Trinidad and Tobago*[10].

What also vitiated the committal for contempt of court in this case was the learned judge's failure to make plain to the appellants the specific nature of the charges and the opportunity to give them a fair hearing. We can only say in conclusion that he had overzealously exercised the power to be used only where absolutely necessary and where it was beyond reasonable doubt that a contempt of court had been committed.

We therefore allowed the appeal and set aside the order of contempt of court against the appellants.

Appeal allowed.

Solicitors: *Allen & Gledhill; Shearn, Delamore & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. PHALTAN SUGAR WORKS LTD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. & Abdoolcader J.) June 24 & September 25, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 39 of 1981]

Revenue Law – Double Taxation – Payment under know-how agreement – Whether income in respect of royalty or capital receipt – Whether payment under Technical Services Agreement constitutes income in respect of royalty – Foreign Company with permanent establishment in Malaysia – Double Taxation Relief (India) Order 1976 – Income Tax Act, 1967, s. 2.

In this case the respondent company was incorporated in India and was engaged in the growing of sugar-cane and the manufacture of sugar in India. It entered into three agreements with the Negeri Sembilan Development Corporation for the purpose of setting up a joint venture namely (a) a know-how agreement (b) a services agreement and (c) an investment agreement.

Under the know-how agreement the appellant sold to the Corporation for use in Malaysia all the processes, formulae, knowledge and technical know-how which had been developed by the appellant for the establishment, organisation, erection and installation of a sugar-cane plantation and sugar factory and the production of sugar and allied products. The Corporation was to make use of all these processes as it might think fit and to dispose of the same to any person for the purpose of their application within Malaysia subject to the consent of the appellant